

IN THE UNITED STATES BANKRUPTCY COURT FOR THE
WESTERN DISTRICT OF WASHINGTON

UNITED STATES TRUSTEE,

Plaintiff,

vs.

THOMAS MCAVITY and NORTHWEST
DEBT RELIEF LAW FIRM,

Defendants.

No. 20-00400

TRANSCRIPT OF THE DIGITALLY-RECORDED RULING

BY THE HONORABLE MARY JO HESTON

SEPTEMBER 3, 2020

Transcribed by: Robyn Oleson Fiedler

1 A P P E A R A N C E S

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3 FOR THE UNITED STATES TRUSTEE:

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1 DIGITALLY RECORDED IN SEATTLE, WASHINGTON

2 SEPTEMBER 3, 2020

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5 THE COURT: All right. I am ready to rule. After
6 review of the complaint, it appears to assert three claims
7 for relief, under Section 11 USC 329, 526, 528, 707(b). It
8 seeks avoidance and cancellation of agreements and
9 disgorgement of fees in specific cases. It also requests
10 injunctive relief under the Court's inherent authority under
11 Section 526(c)(5), and finally, sanctions and civil
12 penalties under Sections 105(a) and 526(c)(5).

13 The counterclaim filed by the defendants in their
14 answer seeks two counts for declaratory relief. First, they
15 seek, under Federal Rule of Bankruptcy Procedure 7001 and
16 7013, for the Court to determine the legality of the
17 defendants' bifurcation model and, two, they seek
18 declaratory judgment regarding the legality of the debtor's
19 use of FSF's financing and payment management services and
20 whether such bifurcation practices and the financing model
21 are prohibited by the Bankruptcy Code or local rules or
22 under the Washington Professional Rules of Conduct.

23 The United States Trustee has sought a motion to
24 dismiss these two identified counterclaims under Federal
25 Rule of Civil Procedure and Federal Bankruptcy Rule 7001(2).

1 Specifically, under Federal Rule of Civil Procedure
2 12(b)(1), they're seeking dismissal based on the fact that
3 this Court does not have subject matter jurisdiction over
4 the defendants' counterclaims because the counterclaims do
5 not present a ripe justiciable case or controversy as
6 required by Article III of the Constitution.

7 A claim is not ripe for adjudication if it rests
8 upon contingent future events that may not occur as
9 anticipated, or indeed, may not occur at all. That's under
10 the statement from the Cardenas vs. Anzai case, 311 F.3d
11 929, at 934 (9th Cir. 2002). And that case was quoting
12 Texas vs. United States, 523 U.S. 296 (1998).

13 Both Article 3 and the Federal Declaratory
14 Judgment Act, 28 USC 2201(a), require that there be an
15 actual case or controversy for the question to be
16 justiciable. Here, the defendants request the Court to
17 declare whether both the bifurcation model used by the
18 defendant and the financing model are prohibited by the Code
19 or local rules.

20 In their counterclaims, the defendants request
21 blanket, general, and prospective rulings that bless these
22 practices in all hypothetical cases. Such requests do not
23 meet the case or controversy requirements because such cases
24 are not yet before this Court, nor may they ever be before
25 this Court. Hypothetical prospective claims that are not

1 applied to specific facts do not meet the case or
2 controversy requirement for Article III standing. And
3 without the defendants meeting these requirements, the Court
4 has no subject matter jurisdiction and cannot render an
5 opinion on the defendants' counterclaims.

6 Further, without a case or controversy presented,
7 the defendants have not presented a claim upon which, as a
8 matter of law, this Court can grant relief. Additionally,
9 even if this Court were to find that it had jurisdiction
10 under the case in controversy standards identified above, I
11 would exercise my discretion not to decide the declaratory
12 claims brought in the defendants' counterclaims for the
13 reasons set forth previously with regard to the case or
14 controversy requirement.

15 Thus, I am going to enter an order granting the
16 Trustee's motion to dismiss the counterclaims under Federal
17 Rule of Civil Procedure 12(b)(1) and 12(b)(6).

18 MR. GARRISON: Judge, may I be heard briefly?

19 THE COURT: I'm sorry?

20 MR. GARRISON: This is Mr. Garrison. Might I be
21 heard briefly?

22 THE COURT: On what point?

23 MR. GARRISON: I would just like to inquire about
24 whether or not we could have leave to amend the counterclaim
25 to assert the specific three Chapter 7 cases that have been

1 filed, rather than making, you know, the blanket
2 allegations, as you characterized them.

3 THE COURT: Mr. Johnson, are you prepared to
4 address that at this time?

5 MR. JOHNSON: Yes, Your Honor. We would strongly
6 urge the Court to decline jurisdiction on those cases as
7 well, again, simply because we've got a lot in this case, as
8 it were. I think contrary to Mr. Garrison's statements,
9 there are very specific conduct here related to the
10 Bankruptcy Code. Some of it is fairly nuanced. And it
11 doesn't necessarily have anything to do with those two other
12 cases -- or the three other cases.

13 I haven't looked at those three other cases. I
14 don't know anything about them. But counterclaims, again,
15 are still permissive. And some of the same issues there
16 probably still exist, I mean, you know, the lack of -- I'm
17 sorry, the lack of the labor of sovereign immunity, you know,
18 problems with pleadings. I suppose those issues could be
19 resolved. But it's going to be, you know, another motion to
20 dismiss, possibly more work on the pleadings before we ever
21 really even get into the meat of this issue.

22 It really feels like, again, Fresh Start Funding
23 is attempting just to highjack these proceedings to its own
24 end, when the United States Trustee really just wants to be
25 focused in this case on Mr. McAvity. And so to that end,

1 again, we would really strongly request that the Court use
2 its discretion and decline jurisdiction over those
3 counterclaims.

4 THE COURT: Mr. Garrison, while I understand the
5 desire to get some certainty in your business practices, I
6 will tell you that I do agree with Mr. Johnson. When I
7 received the counterclaim, before the U.S. Trustee had even
8 filed its motion to dismiss, my reaction was that it went
9 well beyond what was alleged in the complaint. And while
10 some of those issues may come up indirectly in terms of
11 defending the claims brought by the U.S. Trustee, the tenor
12 of the complaint is really one of what kind of disclosures
13 need to be made to the client relative to the practice of
14 bifurcation that Mr. McAvity has chosen to use, not an
15 attack on bifurcation generally.

16 So I think that even with the amendment that would
17 include cases that might have involved the financing, I
18 think I would reach the same conclusion. Mr. Johnson kind
19 of opened that door a little bit in his argument, but I
20 think that we're not in the business of blessing practices
21 generally. If the U.S. Trustee had attacked the use of
22 financing and the practice of bifurcation in the way that
23 Mr. McAvity had done in a more general sense, you might have
24 a better argument. But reading the complaint, it's really
25 more a question of what's pre versus post, what was

1 disclosed, were some things charged that were identified as
2 post but were, in fact, pre.

3 I don't think that an amendment would cure the
4 problems that I identified under the case in controversy or
5 cause me to change my decision or exercising my discretion
6 to deal with them under the Declaratory Judgment Act.

7 So I'm going to deny the request. I'll look to
8 the U.S. Trustee to submit the orders.

9 MR. JOHNSON: Thank you, Your Honor.

10 THE COURT: Thank you.

11 MR. JOHNSON: Do we want -- I guess we still need
12 to discuss scheduling and any other matters that the Court
13 wants to address in the status conference.

14 THE COURT: Well, I don't know. Mr. Garrison,
15 since you haven't been practicing in this district, you may
16 not know what the time limits that we generally set are, but
17 I can kind of go through them, if you're interested. If the
18 parties just want to talk and see if -- normally, we would
19 set the trial date, probably -- I think we're looking now at
20 the end of January, beginning of February. And then you
21 move backwards, probably not dissimilar to other districts
22 that you have practiced in.

23 Generally, we give you 45 days to amend. There's
24 the normal expert disclosures, which are 90 days prior to
25 trial. Discovery is usually 60 days prior to the trial

1 date. Dispositive motions are usually 30 days prior to the
2 trial date. And Mr. Johnson can probably tell you a little
3 bit more specifically.

4 So if you want to talk and then just let
5 Ms. Bergeson know whether you want --

6 MR. GARRISON: That would be great. I'm sorry I
7 didn't look at your standing order before the hearing. I
8 probably should have. But I've been doing this for a very
9 long time. I'm certain that we can fit into your
10 expectations or a schedule. And Mr. Johnson and I, you
11 know, despite having very different legal perspectives on
12 things, we've had some friendly and professional exchanges.
13 I don't have any doubt that we could work out something
14 something that is mutually acceptable and will be acceptable
15 to the Court, too.

16 THE COURT: All right. That's great. And if you
17 decide you want to go forward and pick those dates, then go
18 ahead and just file a stipulation on the dates that you
19 want, or indicate to Ms. Bergeson that you want us to enter
20 our standard order.

21 MR. JOHNSON: Your Honor, Matthew Johnson, the
22 United States Trustee's Office. Could I ask that what the
23 dates are that are available in February?

24 THE COURT: We can look. Right now, I think
25 everything's available.

1 COURTROOM DEPUTY: Nothing the first week, and
2 nothing on the 18th. But otherwise, we're available.

3 THE COURT: Okay. Other than the first week of
4 February or the 18th of February -- which would not be
5 available -- every other date right now in February is
6 available.

7 MR. JOHNSON: Thank you, Your Honor.

8 MR. GARRISON: Thank you, Your Honor. I
9 appreciate it.

10 THE COURT: All right. Thank you.

11 (Whereupon, the case was adjourned.)

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1 CERTIFICATE

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3 ROBYN OLESON FIEDLER certifies that:

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5 The foregoing pages represent a complete
6 transcript of the digitally-recorded proceedings. Some
7 editing changes may have been made at the request of the
8 Court.

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10 These pages constitute the original or a copy of
11 the original transcript of the proceedings to the best of my
12 ability.

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14 Signed and dated this 14th day of September, 2020.

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19 by |s| Robyn Oleson Fiedler
20 ROBYN OLESON FIEDLER

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